

IN THE HIGH COURT OF ZOMBA  
JUDICIAL REVENUE  
ALAWI  
STRY  
) . 16 OF 2017



**BETWEEN**

**THE STATE**

**VS**

**LILONGWE WATER BOARD.....1<sup>ST</sup> RESPONDENT**  
**MINISTER OF AGRICULTURE, IRRIGATION**  
**AND WATER DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**  
**THE DIRECTOR OF ENVIRONMENTAL AFFAIRS.....3<sup>RD</sup> RESPONDENT**  
**THE MINISTER OF NATURAL RESOURCES**  
**ENERGY AND MINING.....4<sup>TH</sup>**  
**RESPONDENT**

**EX PARTE:**

**THE MALAWI LAW SOCIETY**

**CORAM: HON. JUSTICE RE KAPINDU**

**:Mr. B. Theu, Counsel for the Applicant**

**: Mr. A. Tepeka, Official Interpreter**

## **RULING**

**Kapindu, J**

### **1. INTRODUCTION**

- 1.1.** In recent days, the media in Malawi has widely reported on or about a project to abstract and pump water from Lake Malawi (at Salima) to the City of Lilongwe which is Malawi's Capital City. The Malawi Law Society (MLS), a statutory body established under Section 25 of the Legal Education and Legal Practitioners' Act (Cap 3:04 of the Laws of Malawi), is seriously concerned about the manner in which the project is proceeding.
- 1.2.** The MLS questions the lawfulness and procedural propriety of certain decisions on, and the conduct of various authorities that are concerned with, the implementation of the project. It has therefore brought an ex-parte application before this Court, in terms of Order 53 r.3(2) of the Rules of the Supreme Court (RSC), for leave to apply for judicial review of the impugned decisions and conduct.
- 1.3.** The MLS in this regard has, in Form 86A filed with the Court, outlined a number of decisions or other proceedings in respect of which relief is being sought. These are:
  - (a) The failure or contumelious neglect by the 1<sup>st</sup> Respondent, Lilongwe Water Board, as developer of the Salima-Lilongwe/Lake Malawi Water Supply Project (the project) to comply with the legal requirements relating to the conduct of an environmental impact assessment and submitting a report thereof to the competent authorities before implementing the said project;

- (b) The decision by the 1<sup>st</sup> Respondent as developer to proceed with implementation of the project through its contractor, Khato Civils (Pty) Limited, before conducting an environmental impact assessment; submitting a report to the competent authority, and obtaining approval prior to implementation of the project;
- (c) The inaction and/or failure by the 2<sup>nd</sup> Respondent, the Minister of Agriculture, Irrigation and Water Development as the Minister and lead agency responsible for the water sub-sector, to intervene and halt the implementation of the project unless and until an environmental impact assessment has been conducted, a report submitted to the competent authority and the project has been approved;
- (d) Failure by the 3<sup>rd</sup> Respondent to intervene by directing the suspension or halting of the implementation of the Project until and unless an environmental impact assessment has been conducted; and a report of the assessment submitted, publicly reviewed, and until the project has been approved in terms of the applicable law before commencement of implementation; as necessary measures for the protection of the environment;
- (e) Failure and/or inaction by the 4<sup>th</sup> Respondent to take necessary measures to secure the protection of the environment by, among others, requiring the suspension of the project and requiring that the developer complies with the relevant law as to assessment of the impact of the project on the environment and the obtaining of approval of the project before proceeding with implementation through Khatho Civils (Pty) Limited or any other contractor for the purpose.

**1.4.** In this regard, the Applicant, the MLS, seeks a number of substantive reliefs from this Court, namely:

(a) A declaration that the 1<sup>st</sup> Respondent's implementation of the project through Khatho Civils (Pty) Ltd or any other contractor before complying with legal requirements as to environmental impact assessment (EIA) is unlawful;

(b) A declaration that in the absence of an EIA for the project, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are legally obliged to direct the suspension of the implementation of the project and require compliance with the relevant laws as necessary measures for the protection of the environment;

(c) A declaration that the 3<sup>rd</sup> and 4<sup>th</sup> respondents' failure to intervene, as necessary, amounts to abdication of duty and is unlawful;

(d) A declaration that the 2<sup>nd</sup> respondent is legally obliged to require an approval from the 4<sup>th</sup> respondent before granting rights to abstract water from public resources;

(e) A declaration that the 2<sup>nd</sup> Respondent, as a licensing authority has a duty, among others, to control public water and take necessary measures for the conservation and sustainable use of public water resources.

(f) A declaration that the 2<sup>nd</sup> Respondent's direct or indirect permission for the 1<sup>st</sup> Respondent to proceed with the implementation of the project to abstract water from Lake Malawi

in the absence of information as to impacts of the project is unreasonable and unlawful;

(g) A like order to mandamus directing the respondents to comply with the legal requirements as to environmental impact assessment and the obtaining of approval of the relevant Minister before commencing implementation of the project;

(h) That any other necessary and consequential directions, including as to expeditious disposal of this matter, be given;

(i) An Order that no order for costs shall be awarded against the applicant in any event, the matter being of public interest;

(j) An order for the reasonable costs incurred by the Applicant herein

**1.5.** Further, the Applicant prays that if leave to move for judicial review be granted, the Court should grant the following interim orders or reliefs:

(a) An order of interlocutory injunction restraining the 1<sup>st</sup> respondent by itself, its agents, Khato Civils (Pty) Ltd, any other contractor or by whomsoever it may purport to act from implementing the project, and in effect suspending the implementation of the Project pending final determination of this matter or a further order of the Court;

(b) An Order requiring the 1<sup>st</sup> Respondent to make available to the applicant the Project Brief, if any, submitted to the 3<sup>rd</sup> Respondent; the contract between the 1<sup>st</sup> Respondent and Khato Civils (Pty) Ltd; and any relevant document concerning the project.

(c) Alternatively, an order requiring the 3<sup>rd</sup> Respondent to make available to the applicant the documents submitted by the 1<sup>st</sup> Respondent and any other relevant document concerning the project in its custody;

(d) Any other orders and directions as to the Court may appear necessary.

**1.6.** The Applicant states that the application for the provision of information by the various authorities herein is made in order to advance its case herein on behalf of the Malawian public, and that it is made partly in terms of Section 37 of the Constitution of the Republic of Malawi which guarantees the right of access to information.

**1.7.** Further to outlining the impugned decisions and/or proceedings and also the reliefs being sought under Form 86A, the Applicant has proceeded in the usual fashion, to elaborate in narrative form, the grounds upon which the reliefs herein are being sought and which I have carefully gone through.

**1.8.** There is an affidavit verifying the facts relied in support of the application for leave to apply for judicial review sworn by Counsel Mr. David Matumika Banda in his capacity as Vice President of the Malawi Law Society.

**1.9.** I remind myself that the application before me is for leave to apply for judicial review. According to Practice Note 53/14/55 in SCP 1999:

The purpose of the requirement of leave is: (a) to eliminate at an early stage any applications which

are either frivolous, vexatious or hopeless, and (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained is designed to "prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived" (**R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd** [1982] A.C. 617 at 642; [1981] 2 All E.R. 93 at 105, per Lord Diplock). Leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant (ibid., at 644/106). (This Court's emphasis)

**1.10.** Further, in the case of **The State v Inspector General of the Malawi Police Service, Ex-Parte Thokozani Banda**, Judicial Review Cause No. 90 of 2016 (HC, Principal Registry), my brother Judge, Kenyatta Nyirenda J stated that:

It is important...to...remember that the matters that must obtain for an applicant to be granted leave. It is trite law that a court faced with an application for leave ought to be satisfied that: (a) the person

intended to be made a respondent is amenable to judicial review, (b) the applicant has sufficient interest in the matter to which the application relates, (c) the matters/issues raised in Form 86A show a prima facie case fit for further investigations at the intended judicial review proceedings, (d) the applicant does not have an alternative remedy or avenue that would resolve his or her complaint, (e) the application is made promptly, and in any event within three months of the date on which grounds for the application first arose.

**1.11.** In addition, in the case of **Ombudsman v. Malawi Broadcasting Corporation** [1999] MLR 329 at 333, the Court stated as follows:

The law applicable to an application for leave to apply for judicial review is very clear. Once the Court is satisfied, after going through the material before it, that there is an arguable case, then leave should be granted. The discretion that the Court exercises at this stage is not the same as that which the Court is called upon to exercise when all the evidence in the matter has been fully argued at the hearing of the application.

**1.12.** In the instant case, the Court observes that all the intended respondents to the judicial review process are public bodies or authorities and the applicant is impugning various decisions they have made, or conduct they have exhibited, in exercise of their public functions or powers. It is therefore clear to me that the intended respondents are amenable to judicial review.



**1.13.** The second question is whether the Applicant, the Malawi Law Society, has locus standi in the instant case. According to Section 26(1)(d) of the Legal Education and Legal practitioners Act (LELPA), one of the purposes for which the Malawi Law Society was established by Parliament is “to protect and assist the public in Malawi on all matters touching, ancillary or incidental to the law.” The Applicant states that the matters that it raises are matters of public interest and are intended to protect the public on an issue that directly touches on the law, namely compliance with various legal processes relating to environmental protection before a project of the nature of the instant one is commenced. Prima facie, I agree that this is indeed a matter of public interest and that the MLS has a legal duty to take measures intended at protecting the public, within the meaning of Section 26(1) (d) of the LELPA. Indeed, this is not the first time that the Malawi Law Society has come to Court with a matter of a public interest character and been granted standing by these courts.

**1.14.** For instance, in **Malawi Law Society and Others v President and Others** (2002) AHRLR 110 (MwHC 2002), the Malawi Law Society, together with the Episcopal Conference of Malawi and the Malawi Council of Churches, brought an application by way of judicial review, challenging the directive of the then State President, His Excellency Bakili Muluzi, on 28 May 2002 banning all forms of demonstration in relation to the proposed constitutional amendment that sought to allow President Bakili Muluzi to serve unlimited terms in office, and an Executive order that the Minister responsible for Home Affairs, the Inspector General of Police and the Army Commander must deal with anyone who violated such directives. The High Court granted the Malawi Law Society and the other applicants standing. In the instant case, I have no doubt that the Malawi Law Society has sufficient

interest, and therefore legal standing, to bring the judicial review application herein.

**1.15.** The other consideration is whether there is an alternative remedy. I am satisfied by the applicant's representations that there is no alternative remedy for the applicant in the circumstances to secure appropriate reliefs.

**1.16.** The next question is whether, on its face, the application for leave to apply for judicial review has brought out issues that are worthy of further consideration and investigation at a full judicial review hearing. To answer this question, I have examined the provisions of the Environment Management Act (Cap 60:02 of the Laws of Malawi) (EMA) which deal with the question of environmental impact assessments.

**1.17.** Section 24 of the EMA provides as follows:

(1) The Minister may, on the recommendation of the Council specify, by notice published in the Gazette, the types and sizes of projects which shall not be implemented unless an environmental impact assessment is carried out.

(2) A developer shall, before implementing any project for which an environmental impact assessment is required under subsection (1), submit to the Director, a project brief stating in a concise manner—

- (a) the description of the project;
- (b) the activities that shall be undertaken in

the implementation of the project;

(c) the likely impact of those activities on the environment;

(d) the number of people to be employed for purposes of implementing the project;

(e) the segment or segments of the environment likely to be affected in the implementation of the project;

(f) such other matters as the Director may in writing require from the developer or any other person who the Director reasonably believes has information relating to the project.

(3) Where, upon examining the project brief, the Director considers that further information is required to be stated in the project brief before an environmental impact assessment is conducted, the Director shall require the developer, in writing, to provide such further information as the Director shall deem necessary.

**1.18.** Under General Notice No. 58 of 1998, the Minister promulgated the “Environment (Specification of Projects Requiring Environmental Impact Assessment) Notice.” Regulation 2 under the Notice provides that “The projects specified in the Schedule shall not be implemented unless an environmental impact assessment is carried out.” In turn, under Part 3(c) and (d) of the Schedule, such projects include: “(c) water pumping stations adjacent to lakes, rivers and reservoirs which withdraw more than 2 cubic metres per second,” and “(d) drinking water supply schemes to serve a population of greater than 10,000 people or expansions of existing schemes to serve such a population,

or water reticulation networks with more than 10 kilometres of pipeline.”

**1.19.** In his affidavit verifying facts, Counsel Matumika Banda has exhibited a letter, marked as exhibit “DMB1” dated 5 April 2017 from the director of Environmental Affairs to the President of the Malawi Law Society, which purports to respond to a letter from the President of the Malawi Law Society dated 21 March 2017 on the subject: “ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REPORT: SALIMA-LILONGWE WATER PROJECT.”

**1.20.** In that letter, the Director of Environmental Affairs agrees with the President of the Malawi Law Society that “EIA is required for a project such as the Salima-Lilongwe Water project.” He then proceeds to state that:

In terms of EIA for the Salima-Lilongwe Water Project,  
I wish to advise as follows:

- (a) The EIA report for the proposed project has not yet been submitted to the Department;
- (b) In accordance with the national EIA process, LWB as a project developer submitted to the department a project brief for the project on 4<sup>th</sup> January 2017. The project brief was reviewed by the Department and LWB was advised to conduct an ESIA, based on agreed upon TORs through our letters dated 19<sup>th</sup> January 2017 and 6<sup>th</sup> February 2017.
- (c) We have been advised by LWB that they are currently in the process of engaging EIA experts to undertake the EIA.

Once the EIA is submitted to the Department it will be reviewed by the Technical Committee on the Environment (TCE) and relevant stakeholders including interested and affected parties. Comments and issues raised by the TCE and stakeholders will then be provided to LWB for incorporation into the EIA Report. Thereafter, if found to be satisfactory, the EIA report will be presented to the National Council for the Environment for approval. If approval is granted, an EIA certificate will be issued to LWB, at which stage LWB can commence implementation.”

The letter then ends:

Please note that since the EIA is yet to be conducted, we are not able to furnish you with the EIA report as requested. However, as EIAs are public documents, you will be provided with a copy of the EIA report for your review and comment, once we receive it.

**1.21.** It is clear from this exhibit that an EIA has not yet been conducted and that a satisfactory EIA Report is a condition precedent to the implementation of a project such as the one in the instant case. The MLS is concerned that project implementation has already started and that the contractor, Khatho Civils (Pty) Ltd is reportedly busy with project implementation activities. The Applicant, the MLS, states at paragraph 5.3 of the Grounds on Which Relief is Sought that the details of the project have not been made publicly available by the respondents and that “The little known about the project has been information relayed by the media.” The Applicant states that “It is however reasonably expected that the respondents have in their

custody critical documents outlining the project, including in particular a project concept note.”

**1.22.** The MLS is further concerned, as expressed at paragraph 5.5 of the Grounds on which Relief is Sought that “Consequent upon the lack of an environmental impact assessment, no information has been supplied to the public as to the potential adverse impacts of the project on the environment.” It avers that “the public has thus not participated in the project through inspection of an [EIA] and making comments thereon as envisaged under the [EMA]”

**1.23.** The MLS proceeds to lament, at paragraph 5.6 of the Grounds on which Relief is Sought that “Despite the absence of an environmental impact assessment, the 1<sup>st</sup> respondent’s contractor is intent on commencing and has so commenced implementation of the project.”

**1.24.** According to the affidavit verifying these facts, Counsel Matumika Banda depones that the facts stated in paragraph 5.6 of the Grounds on which Relief is Sought are based on notorious facts.

**1.25.** The MLS bemoans the fact that “despite knowledge that no [EIA] has been conducted prior to commencement of implementation of the project, the respondents have not taken adequate measures to ensure compliance with the requirements of the law as to environmental impact assessment before commencement of the implementation of the project.”

**1.26.** Again in his affidavit verifying this proposition of fact, Counsel Matumika Banda deposes that: “I confirm that the same are notorious facts and necessary inferences from the absence of any information to

the public concerning any necessary measures in respect of the impugned project.”

**1.27.** On examining the issues raised, this Court is satisfied that the Applicant has raised matters that are fit for further consideration and investigation at a full hearing of judicial review. The Applicant has an arguable case. The matters raised by the MLS are neither frivolous, vexatious nor hopeless. **I therefore grant the Applicant leave to apply for judicial review.**

**1.28.** I now proceed to the various interim reliefs which the Applicant has prayed for in the event that this Court grants the Applicant leave to apply for judicial review as it has done.

**1.29.** First, there is a prayer for an order of interlocutory injunction restraining the 1<sup>st</sup> respondent by itself, its agents, Khato Civils (Pty) Ltd, any other contractor or by whomsoever it may purport to act from implementing the project, and in effect suspending the implementation of the Project pending final determination of this matter or a further order of the Court.

**1.30.** On this point, I have addressed my mind to the decision of Mwaungulu, JA, in the case of **The State v The President and another Ex-parte Kajoloweka**, MSCA Civil Appeal No 5 of 2017. In essence, the learned Justice of Appeal took the view that an application for an interim injunction, when brought in the course of judicial review proceedings, must still comply with the rules that apply to the normal grant of an interim injunction. I agree with him, in addition to the fact that the said decision, being a decision of the Supreme Court of Appeal, is binding on this Court.

**1.31.** Put simply, Order 53 of the Rules of the Supreme Court does not provide an avenue to an applicant, who applies for an interlocutory injunction in the course of judicial review proceedings, to circumvent the normal principles applicable to the grant of an interlocutory injunction under Order 29 of the RSC.

**1.32.** Thus for instance, Order 29 Rule 1(2) of the RSC provides that:  
“Where the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.”

**1.33.** Understood in its proper context, Order 29 Rule (1)(2) suggests that the general rule, when it comes to applications for interlocutory injunctions, is that they must come inter partes. An interlocutory injunction should only be granted ex-parte where there is demonstration of urgency. According to Practice Note 29/1A/21 under the Supreme Court Practice, 1999, there must be demonstration of “real urgency” in order for an interlocutory injunction to be granted ex-parte. According to that Practice Note:

Generally, an injunction will be granted ex parte only in cases of emergency or, as r.1 puts it, in cases of "urgency", and it must be shown that there are strong grounds to justify the application being made ex parte (per Lindley J., Anon [1876] W.N. 12). A case may be one of "urgency" either (1) because the matter is too urgent to await a hearing on notice, e.g. where property is in danger of being lost or destroyed (**Brand v. Mitson** (1876) 24 W.R. 524,



**London and County Banking Co. v. Lewis** (1882) 21 Ch.D. 490, **Evans v. Puleston** [1880] W.N. 127, **Fenwick v. East London Railway** (1875) L.R. 20 Eq. 544 at 547), or (2) because the very fact of giving notice may precipitate the action which the application is designed to prevent (**Brink's-MAT v. Elcombe** [1988] 1 W.L.R. 1350; [1988] 3 All E.R. 188, CA, at 1358 and 193 respectively, per Balcombe L.J.).

**1.34.** In the instant case, no attempt whatsoever has been made by the Applicant in the documents filed, either in the Grounds on Which Relief is Sought or in the affidavit verifying facts to demonstrate that the matter is of such a degree of urgency as to merit the granting of an interlocutory injunction ex-parte. It could well be that some urgency perhaps exists, but for certain there has been no such demonstration before me at this stage.

**1.35.** Considering that a prayer for an interlocutory injunction brought in the course of judicial review proceedings must still satisfy the principles based on which interlocutory injunctions are generally granted in terms of the rules of practice, **I hold that by reason of lack of demonstration of urgency, the prayer for an interlocutory injunction herein, made ex-parte, cannot be sustained.**

**1.36.** The Court recalls at this juncture, that Order 53 Rule 3(10) of the RSC provides as follows:

(10) Where leave to apply for judicial review is granted, then -

- (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
- (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

**1.37.** The Court has gone through the application carefully. If the applicant had made a prayer akin to that of *prohibition* or *certiorari*, the Court would have considered making a direction that the grant of leave to apply for judicial review herein should operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders. This is a restraining order permitted by the rules which this Court may competently make. However, the Court has noted that the applicant has essentially only prayed for a series of declarations and the one substantive Order for relief that it has prayed for is a like Order to that of *mandamus*. The result is therefore that, in terms of Order 53 Rule 3(10)(b) of the RSC the Court may, at any time in these proceedings, grant such interim relief as could be granted in an action begun by writ. Following the procedure of actions commenced by Writ, it appears to me, takes us back to the prayer for an interlocutory injunction originally made by the Applicant. The Court has already held that this cannot be granted *ex parte* at this stage in the absence of a demonstration of urgency. **The Court therefore directs that the application for an interlocutory injunction should be made *inter partes*, to be heard on the 9<sup>th</sup> Day of May 2017 at 9:00 am or as soon thereafter as counsel may be heard.**

**1.38.** The other interim sought by the Applicant in the event of leave being granted are:

(a) An Order requiring the 1<sup>st</sup> Respondent to make available to the applicant the Project Brief, if any, submitted to the 3<sup>rd</sup> Respondent; the contract between the 1<sup>st</sup> Respondent and Khato Civils (Pty) Ltd; and any relevant document concerning the project;

(b) Alternatively, an order requiring the 3<sup>rd</sup> Respondent to make available to the applicant the documents submitted by the 1<sup>st</sup> Respondent and any other relevant document concerning the project in its custody;

(c) Any other orders and directions as to the Court may appear necessary.

**1.39.** The Applicant states that the application for the provision of information as outlined in paragraph 1.38(a) & (b) herein is made in terms of Section 37 of the Constitution which guarantees the “right of access to all information held by the State or any its organs at any level of Government in so far as such information is required for the exercise of his or her rights.” The MLS states that it needs such information in order to properly prosecute the judicial review application herein.

**1.40.** I am persuaded that this request falls within the remit of the right of access to information under Section 37 of the Constitution. **The Court therefore grants the prayer for an Order requiring the 1<sup>st</sup> Respondent to make available to the applicant the Project Brief, if any, submitted to the 3<sup>rd</sup> Respondent; the contract**

**between the 1<sup>st</sup> Respondent and Khato Civils (Pty) Ltd; and any relevant document concerning the project; and a further Order requiring the 3<sup>rd</sup> Respondent to make available to the applicant the documents submitted by the 1<sup>st</sup> Respondent and any other relevant document concerning the project in its custody.**

Made at Zomba in Chambers this 21<sup>st</sup> Day of April 2017

RE Kapindu, PhD

**JUDGE**